(3)

No. 95-1779

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

ROBERT DRISCOLL,
A State Prisoner Under Capital Sentence,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONER'S REPLY BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Counsel of Record

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioner

12 pp

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether respondent is entitled to a writ of habeas corpus under 28 U.S.C. § 2254(d) (approved April 24, 1996) where the state courts' resolution of respondent's claims was reasonable?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RESPONDENT IS NOT ENTITLED TO A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254(D) (APPROVED APRIL 24, 1996) BECAUSE THE STATE COURTS' RESOLUTION OF RESPONDENT'S CLAIMS WAS REASONABLE.

After the Court of Appeals' decision affirming the district court's grant of the writ of habeas corpus (Appendix A-1), Congress passed and the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (Act). Pub. L. 104-132, 110 Stat. 1217. The petition for *writ of certiorari* requests the Court to remand the cause to the Court of Appeals for reconsideration in light of the Act. That approach has been used again and again by this Court in similar circumstances. *See*, e.g., **Hicks v. Brown Group**, 503 U.S. 901 (1992) (granting writ and remanding cause for further consideration in light of the Civil Rights Act of 1991); **Holland v. First Virginia Banks**, 502 U.S. 1086 (1992) (same); **Gersman v. Group Health Assoc.**, 502 U.S. 1068 (1992) (same). None of the arguments presented by respondent in his brief in opposition (hereinafter "BIO") demonstrate that the Court should take another approach in this case.

Instead, respondent suggests that *certiorari* is improvident since § 104 of the Act continues to authorize *de novo* review of legal issues by the federal court in considering a petition for writ of habeas corpus (BIO p. 11). But that construction of the Act is erroneous. Amended 28 U.S.C. § 2254(d)(1) allows no deference to the state-court ruling only where the state-court decision "was contrary to, or involved an unreasonable application of, clearly-established federal law, as determined by the Supreme Court of the United States" (A-168). The "contrary to clearly-established federal law" provision

does not continue the former standard of *de novo* legal review; otherwise, the remaining language of § 2254(d)(1), the "reasonable application" standard, would never be examined.

The "contrary to clearly-established federal law" provision should be implicated only in truly egregious situations. For example, a state-court declaration that there were no Sixth and Fourteenth Amendment rights to counsel at trial would be "contrary to clearly-established federal law," or, if a state court were to require a criminal defendant to sustain the **Swain** burden of proof instead of the **Batson** burden of proof in a trial conducted after 1986, then that decision would be contrary to clearly-established federal law. *Compare* **Batson v. Kentucky**, 476 U.S. 79 (1986) *with* **Swain v. Alabama**, 380 U.S. 202 (1965). Phrased a little differently, a state-court decision is "contrary to clearly-established federal law" only if the state court applied federal constitutional law other than that "dictated by precedent existing at the time the defendant's conviction became final." **Teague v. Lane**, 489 U.S. 288, 301 (1989). A federal court's mere disagreement with the state court's application of federal law is a far cry from the standard now imposed by law: that the state court's decision was either contrary to clearly-established federal law or involved in unreasonable application of clearly-established federal law.

Applying this standard to the present case, in resolving the ineffective assistance of trial counsel claim, the Missouri Supreme Court found neither a breach of duty nor resulting prejudice under the **Strickland v. Washington**, 466 U.S. 68 (1984) standard (A-140-41; A-153-54). Likewise, the Eighth Amendment issue was resolved by the Missouri Supreme Court during

respondent's direct appeal on the basis of **Caldwell v. Mississippi**, 472 U.S. 320 (1985) (A-128-29). The state courts' resolution of respondent's claims cannot be described as "contrary to clearly-established federal law." Rather, as petitioner noted in the petition (Petition, pp. 15-16, 17, 17-18), the state court's analysis was a reasonable application of clearly-established federal law. The respondent, who is entitled to no habeas corpus relief under the new Act, offered no response.

In Sections V and VI of respondent's brief in opposition, respondent contends that application of the deference requirement in 28 U.S.C. § 2254(d)(1) violates the Suspension Clause in Art. I, § 9, clause 2 of the Constitution (BIO pp. 15-16), Art. III of the Constitution (BIO, pp. 13-14), and the Due Process Clause of the Fourteenth Amendment (BIO p. 15). Respondent also contends that the Act should not apply to cases pending at the time the Act became effective (BIO pp. 17-27). These are issues that can be decided not in considering a petition of certiorari, but by the Court of Appeals on remand. Alternatively, they are good issues for certiorari review in and of themselves. But they do not justify affirming the pre-Act judgment of the Court of Appeals.

Respondent contends that the deference requirement in 28 U.S.C. § 2254(d) undermines the Court's Article III powers to say what the law is (BIO, pp. 13-14). His assertion misses the mark. The reform contained in § 2254(d) requires the federal courts to defer to reasonable state-court resolution of claims. It is untenable to argue that principles of *res judicata* and *collateral estoppel* that are now enforced by the Act somehow undermine Art. III of the Constitution. No one can seriously contend that Art. III prohibits enforcement of

those finality principles with litigation under 42 U.S.C. § 1983 or with any other form of litigation.

Respondent contends that the deference requirement of 28 U.S.C. § 2254(d)(1) violates the Due Process Clause of the Fourteenth Amendment (BIO p. 15). Again, the true issue is what effect the state courts' judgment should have. Respondent refers the Court to no precedent to support the proposition that the Due Process Clause regulates the scope of the writ of habeas corpus, a collateral proceeding in federal court concerning the lawfulness of custody. In any event, notions of fundamental fairness are not offended by a state court's reasonable application of the federal Constitution.

Finally, concerning the suspension-clause issue (BIO pp. 15-16), assuming the clause applies to prisoners in state custody, *see* **Felker v. Turpin**, 116 S.Ct. 2333, 2340 (1996)--an issue that is worthy of *certiorari* review in and of itself, *see* **Id.**, citing **Swain v. Pressley**, 430 U.S. 372 (1977)--28 U.S.C. § 2254(d)(1) merely regulates the writ availability when claims are litigated in state court. This provision of the Act is within the compass of the evolutionary process of the writ of habeas corpus described in **Felker v. Turpin**. Id.

Respondent's final contention is that the deference provision of 28 U.S.C. § 2254(d)(1) is not applicable to cases pending when the Act became effective on April 24, 1996 (BIO pp. 17-27). Respondent acknowledges the diverse opinions by the lower courts concerning this issue (BIO pp. 23-24). *See* **Cockrum v. Johnson**, 1996 WL 425563, at p. * 3 (E.D. Tex. July 25, 1996) (discussing diverse positions of the lower courts). Of the cases cited by respondent, however, only one

deals with the amendment to § 2254(d), and that opinion determines that the reform provision applies to pending cases. **Leavitt v. Arave**, 927 F. Supp. 394, 397 (D. Idaho 1996). The court below, the United States Court of Appeals for the Eighth Circuit, has not decided the applicability of the Act to cases pending on April 24, 1996, but it has hinted in *dicta* that it is applicable. **Feltrop v. Bowersox**, No. 93-2738, slip op. at 3 n.2 (8th Cir. Aug. 8, 1996).

Petitioner suggests that since § 107 of the Act containing 28 U.S.C. §§ 2261-66 contains a provision applying those statutes to pending capital cases, the lack of a provision in §§ 101-106 of the Act means that Congress did not intend that set of revisions to be applied to pending cases (BIO pp. 19-24). The Court rejected such use of negative inferences in **Landgraf v. USI Film Products**, 114 S.Ct. 1483, 1494 (1994). And the express provision for Chapter 154 was necessary to ensure that states who opted in under 28 U.S.C. § 2261 at a time after April 24, 1996, receive the benefits of that chapter for their pending cases. **Leavitt v. Arave**, 927 F. Supp. at 398.

In the petition for writ of certiorari, petitioner suggested that 28 U.S.C. § 2254(d) applied to pending cases since the provision regulated secondary rather than primary conduct (Petition for Writ of Certiorari, pp. 12-13). Respondent agrees that habeas corpus review is procedural in nature and regulates secondary conduct (BIO pp. 24-25). Further, the statute regulates the availability of prospective relief. A writ of habeas corpus is a form of injunctive relief against a state custodian--a situation where a modified statute applies retrospectively. **Landgraf v. USI Film Products**, 114 S.Ct. at 1501. In fact, due to the Eleventh Amendment, the writ's

exclusive focus on prospective relief is constitutionally based.

Finally, respondent notes a hostility by the lower courts to the retrospective application of the Act (BIO pp. 23-24 (collecting cases)). Concerning the retrospective application of 28 U.S.C. § 2254(d) (effective April 24, 1996), the Court of Appeals for the Second Circuit has rejected retrospective use of this provision; however, the analysis of the Circuit Court does not discuss in detail the issues presented by this Court in **Landgraf**. *See* **Boria v. Keane**, 996 U.S.L.W. 397290 (2d Cir. July 17, 1996). In light of the hostility by the lower courts to the retrospective application of the Act, this case gives an early opportunity to correct this attitude.

CONCLUSION

For the prevailing reasons, petitioner prays the Court issue a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Stephen D. Hawke by ZbA Jr

STEPHEN D. HAWKE
Counsel of Record

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioner